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Supreme Court of the United States

OCTOBER TERM, 1951

KONRAD G. JOHANSEN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

WILLIAM L. STANDARD,
Attorney for Petitioner.

LOUIS R. HAROLDS,
on the Brief.

INDEX

	PAGE
I	1
II	3
III—Questions Presented	3
IV—Reasons for Allowance of Writ	4
V	5
POINT I—The Workmen's Compensation Statute did not provide an exclusive remedy	7
POINT II—The mere acceptance of compensation by a seaman, is not the equivalent of an election	16
CONCLUSION	20

CASES CITED

American Stevedores, Inc. v. Porello, 330 U. S. 446, 67 Sup. Ct. 847 (1947)	8, 16, 19
Balado v. Lykes Bros. SS Co., Inc., 179 F. (2d) 943 (C. A. 2d 1950)	17
Bay State Dredging & Contracting Co. v. Porter, 153 F. (2d) 827 (C. C. A. 1st 1946)	18
Brady v. Roosevelt S. S. Co., 317 U. S. 575, 587, 63 Sup. Ct. 425 (1943)	16
Brady v. U. S., 151 F. (2d) 742 (C. C. A. 2d), cert. den. 326 U. S. 795, 66 Sup. Ct. 484, reh. den. 328 U. S. 880, 66 Sup. Ct. 1348 (1946)	8
Brooks v. U. S., 337 U. S. 49, 69 Sup. Ct. 918 (1949)	10
Canadian Aviator, Ltd. v. U. S., 324 U. S. 215, 65 Sup. Ct. 639 (1945)	7, 19
Dahn v. Davis, etc., 258 U. S. 421, 42 Sup. Ct. 320 (1922)	9, 10, 16

PAGE

Dobson v. U. S., 27 F. (2d) 807, cert. den. 278 U. S. 653, 49 Sup. Ct. 179 (1929) 8

Feres v. U. S., 340 U. S. 135, 71 Sup. Ct. 153 (1950) 8

Gahagan Construction Corp. v. Armao, 165 F. (2d) 301, cert. den. 333 U. S. 876, 68 Sup. Ct. 905 (1948) 20

Garrett v. Moore McCormack Lines, Inc., 317 U. S. 239, 63 Sup. Ct. 246 (1942) 18

Gibbs v. U. S., 94 F. Supp. 586 (D. C. Cal., 1950) 11, 16

Hume v. Moore McCormack Lines, Inc., 121 F. 2d 376 (C. C. A. 2d 1941) 18

Jentry v. U. S., 73 F. Supp. 839 (D. C. Cal., 1947) 8, 19

Johnsen v. American Hawaiian SS Co., 98 F. (2d) 847 (C. C. A. 9th 1938) 18

Johansen v. U. S., 191 F. 2d 162 (C. A. 2d 1950) 2, 9, 16

Johansen v. U. S., 191 F. 2d 162 (C. A. 2d 1950) 2, 9, 17

Johnson v. U. S., 186 F. (2d) 120 (C. A. 4th, 1950) 3, 4, 8, 14, 16, 19

Kibadeaux v. Standard Dredging Co., 81 F. (2d) 670 (C. C. A. 5th, 1936) 20

Lanro v. U. S., 162 F. (2d) 32 (C. C. A. 2d 1947) 8, 19

Lawson v. U. S., 1950 A. M. C. 617 (D. C. Cal.) 8, 19

Mandel v. U. S., 74 F. Supp. 754 (E. D. Pa. 1947) 16

Mandel v. U. S., 191 F. 2d 164 (C. A. 3rd, 1951) 3, 4, 5, 9

McCarthy v. Amer. Eastern Corp., 175 F. 2d 724 (C. A. 3rd, 1949) 17

Mejia v. U. S., 152 F. (2d) 686 (C. C. A. 5th, 1945), cert. den. 328 U. S. 862, 66 Sup. Ct., 1366 (1946) 8, 19

McKenney v. U. S., 99 F. Supp. 121 (D. C. Cal., August, 1951) 4, 17

PAGE

Militano v. U. S., 156 F. (2d) 599 (C. C. A. 2d, 1946) 16

Muruaga v. U. S., 172 F. (2d) 318 (C. A. 2d, 1949) 18, 20

O'Neal v. U. S., 11 F. 2d 869, Aff'd 11 F. 2d 871, 1926 7

Osbourne v. U. S., 164 F. (2d) 767 (C. A. 2d, 1947) 21

Rodriguez v. U. S., F. Supp. , 1951 A. M. C. 512 (D. C. Penna.) 17

Seas Shipping Co. v. Sieracki, 328 U. S. 85, 66 Sup. Ct. 872 (1946) 19

Shilman v. U. S. et al., 164 F. (2d) 649 (C. C. A. 2d 1947), cert. den. 333 U. S. 837, 68 Sup. Ct. 608 (1948) 17

Southern SS. Co. v. N. L. R. B., 316 U. S. 31, 62 Sup. Ct. 886 (1942) 21

Thomason v. U. S., 184 F. 2d 105 (C. A. 9th, 1950) 8, 19

U. S. v. Loyola, 161 F. (2d) 126 (C. C. A. 9th, 1947) 3, 4, 8, 10, 11, 14, 19

U. S. v. Marine, 155 F. (2d) 456 (C. C. A. 4th, 1946) 3, 4, 10, 11, 14

Wagner v. Panama Railroad Co., 299 N. Y. 432 (1949) 17

STATUTES CITED

5 U. S. C. 751-757; 791-794 4, 9, 11, 12, 14

46 U. S. C. 688 et seq. 19

46 U. S. C. 741-749 7

AUTHORITIES CITED

95th Congressional Record 13609 14

"Recent Trends in the Controversy Over the Extension of Workmen's Compensations", 4 N. A. C. C. A. L. J. 229 (1949) 13

Supreme Court of the United States

OCTOBER TERM, 1951

KONRAD G. JOHANSEN,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To: The Chief Justice and Associate Justices of the Supreme Court of the United States.

The petitioner, Konrad G. Johansen, respectfully shows this Honorable Court:

I

Your petitioner filed a suit in admiralty in the United States District Court for the Southern District of New York, seeking to recover $25,000 damages for personal injuries sustained while he was employed by the government, as a civilian seaman, comprising part of the crew of the U. S. A. T. Kingsport Victory, a public vessel of the United States.

The libel alleged that on August 5, 1949, the petitioner, while working, was hit in the leg by falling lumber and was injured, because of the negligence of the respondent and the unseaworthiness of the vessel. The respondent's own exhibits show that at the time of this accident the vessel was at its pier in Brooklyn, New York, and was

not engaged in any military operation. Petitioner was admitted to a U. S. Marine Hospital that same day, where he received treatment until October 24, 1949, with two further weeks of disability thereafter, following the skin graft operation and other treatment which he received for his lacerated leg.

It was conceded by the Government in the Court below that petitioner was expressly informed by his superiors, acting on behalf of the United States, that he had no right to seek damages against the Government under the Public Vessels Act, but was told instead that his sole and exclusive right was to receive compensation benefits under the United States Employees' Compensation Act. Believing this information to be correct, and influenced by it, he duly made application for compensation benefits, and was awarded and paid $358.20, until his disability terminated on November 7, 1949, at which time he resumed his duties.

He then brought this suit. The District Court dismissed the suit, holding that when he was injured petitioner had a right to elect whether to sue the Government for damages or accept compensation benefits instead, but that by accepting the compensation benefits he had precluded himself from suing the Government for damages, even though his employer had misled him as to his rights (reported as *Johansen* v. *U. S.*, 1951 A. M. C. 117).

On appeal, the United States Court of Appeals for the Second Circuit held that a civilian seaman employed by the Government on a public vessel, although injured because of fault attributable to the United States, has no right of election; that such a person has no right to sue the Government for damages for personal injuries brought about by his employer's negligence or the vessel's unseaworthiness, and that his exclusive remedy would be to seek workmen's compensation benefits (reported as *Johansen v. U. S.*, 191 F. 2d 162 (C. A. 2nd, 1951)). Circuit Judge Chase wrote the majority opinion. Circuit Judge Frank wrote a dissenting opinion to the effect that such

a seaman has a right of election under the reasoning of *Johnson* v. *U. S.*, 186 F. 2d 120 (C. A. 4th, 1950), and since petitioner's superiors had erroneously led him to believe that his sole remedy was under the Compensation Act, petitioner never actually exercised his right of election, and therefore had a right to maintain this suit.

This petition is filed because the decision herein enunciates a doctrine which is in conflict with the decisions in

Johnson v. *U. S.*, 186 F. (2d) 120 (C. A. 4th, 1950);
U. S. v. *Marine*, 155 F. (2d) 456 (C. A. 4th, 1946);
U. S. v. *Loyola*, 161 F. (2d) 126 (C. A. 9th, 1947).

It also involves an important question of Federal law as to which there is now a conflict between the Second and Third Circuits, on the one hand (see recent decision in *Mandel* v. *U. S.*, 191 F. (2d) 164 (C. A. 3rd, 1951)), and the Fourth and Ninth Circuits, on the other hand. This conflict has not been, but should be, squarely resolved and settled by this Court.

II

The jurisdiction of this Court rests on Section 1254(1) of Title 28 of the United States Code. The decision and judgment of the Court of Appeals in the instant case was rendered on July 30, 1951, and the final decree on mandate was entered on August 31, 1951.

III

Questions Presented

The majority opinion of the Court of Appeals succinctly stated the question presented as follows:

> "This appeal requires us to decide whether a civil employee of the United States who is employed as a member of a crew of an army transport may sue the

government, under the Public Vessels Act, 46 U. S. C. §§ 741-749, to recover for personal injuries received in line of duty, or must accept as sole compensation an award under the Federal Employees' Compensation Act, 5 U. S. C. § 751 et seq."

Since the majority opinion came to the conclusion that petitioner's exclusive remedy lay under the Compensation Act, it did not decide whether payment to him of compensation benefits, when his employer had misinformed him concerning his rights, precluded him from bringing the suit for damages. The dissenting opinion decided these questions in favor of petitioner.

IV

Reasons for Allowance of Writ

Your petitioner advances the following reasons why this Honorable Court should grant the prayer of his petition:

a) The decision of the Court of Appeals for the Second Circuit rendered in this case, and the more recent decision of the Court of Appeals for the Third Circuit in the case of *Mandel* v. *U. S.*, supra, are directly opposed to the decisions of the Court of Appeals for the Fourth Circuit in *Johnson* v. *U. S.*, supra, and *U. S.* v. *Marine*, supra, and the decision of the Court of Appeals for the Ninth Circuit in *U. S.* v. *Loyola*, supra. See also recent decision in *McKenney* v. *U. S.*, 99 F. Supp. 121 (D. C. Cal., Aug. 1951).

The dissenting opinion of Circuit Judge Frank in the instant case expressly agrees with the rule as laid down in the Fourth Circuit in *Johnson* v. *U. S.*, supra, and holds that both the District Court and the Court of Appeals for the Second Circuit herein committed error in dismissing petitioner's libel.

There are at the present time pending in various United States courts an undetermined and large number of cases where this question is presented, and until this Honorable Court shall lay down an authoritative determination of this question there will continue to exist a conflict of authority, resulting in conflicting rulings in different parts of the United States, interpreting the same Federal law.

b) The issue present here involves an important question of Federal law which has not been, but should be, squarely settled by this Court.

V

For the reasons advanced herein, and in the brief supporting the application, your petitioner is advised and believes that the determinations of the United States Court of Appeals for the Fourth and Ninth Circuits properly interpret the laws involved and that the determination of the Court of Appeals for the Second Circuit in the instant case and that of the Third Circuit in the *Mandel* case are erroneous in holding that civilian seamen employed by the Government on public vessels have no right to elect to sue under the Public Vessels Act for damages for personal injuries resulting from negligence and/or unseaworthiness.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may issue, directed to the United States Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court a full and complete transcript of the record of all proceedings had in said Court in the above entitled cause, to the end that said cause may be reviewed and determined by this Court as provided by law.

Respectfully submitted,

KONRAD G. JOHANSEN,
Petitioner.

STATE OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:
COUNTY OF NEW YORK

WILLIAM L. STANDARD, being duly sworn, says that he is the attorney for Konrad G. Johansen, the petitioner herein; that he has read the said petition subscribed by him and that the facts therein stated are true to the best of his knowledge, information and belief.

WILLIAM L. STANDARD.

Sworn to before me this
25th day of October, 1951.

MALCOLM B. ROSOW,
Notary Public for the State of New York,
No. 41-3363275.
Qualified in Queens County.
Certs. filed with N. Y. & Richmond Co. Clks.
Cert. filed with Queens Reg.
Commission Expires March 30, 1953.

Supreme Court of the United States

OCTOBER TERM, 1951

KONRAD G. JOHANSEN,
Petitioner,
against
UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S BRIEF ON APPLICATION FOR WRIT OF CERTIORARI

POINT I

The Workmen's Compensation Statute did not provide an exclusive remedy.

The basic question here is whether the petitioner was entitled to sue the Government for damages under a tort liability act (The Public Vessels Act), or whether he was relegated to an exclusive remedy under the Federal Employees' Compensation Act. It thus becomes necessary to consider how the courts have interpreted both of these acts.

In 1926, the Public Vessels Act was adopted (46 U. S. C. section 741-749), giving a right to sue the Government for damages resulting from the fault of a public vessel of the United States. At first this was interpreted as referring to "damage physically done by a ship" (*O'Neal* v. *U. S.*, 11 F. (2d) 869, aff'd 11 F. (2d) 871, 1925). That interpretation, however, was held to be too narrow a construction. In *Canadian Aviator, Ltd.* v. *U. S.*, 324 U. S. 215, 65 Sup. Ct. 639 (1945), it was finally held that the

Public Vessels Act makes the Government liable to respond in damages for the negligence of its personnel, or the unseaworthiness of a public vessel, and that the Act is not limited to damage physically done by a ship.

American Stevedores, Inc. v. *Porello,* 330 U. S. 446, 67 Sup. Ct. 847 (1947);
Mejia v. *United States,* 152 F. (2d) 686 (C. C. A. 5th, 1945) cert. den. 328 U. S. 862, 66 Sup. Ct. 1366 (1946);
United States v. *Loyola,* 161 F. (2d) 126 (C. C. A. 9th, 1947);
Johnson v. *United States,* 186 F. (2d) 120 (C. A. 4th, 1950);
Lauro v. *United States,* 162 F. (2d) 32 (C. C. A. 2d, 1947);
Thomason v. *United States,* 184 F. (2d) 105 (C. A. 9th, 1950);
Jentry v. *United States,* 73 F. Supp. 899 (D. C. Cal., 1947);
Lawson v. *United States,* 1950 A. M. C. 617 (D. C. Cal.).

Meanwhile, however, the Public Vessels Act was further construed as holding that it did not give a right to recover damages from the Government, for injuries sustained by military personnel in the line of active duty.

Brady v. *United States,* 151 F. (2d) 742 (C. C. A. 2d), cert. den. 326 U. S. 795, 66 Sup. Ct. 484, ref. den. 328 U. S. 880, 66 Sup. Ct. 1348 (1946);
Dobson v. *United States,* 27 F. (2d) 807, cert. den. 278 U. S. 653, 49 Sup. Ct. 179 (1929).

This is similar to the interpretation recently given to the Federal Tort Claims Act, under which shore-side military personnel have similarly been held not entitled to sue the Government for damages for personal injuries sustained in the line of active duty (*Feres* v. *U. S.,* 340 U. S. 135, 71 Sup. Ct. 153 (1950)).

Thus the Public Vessels Act, like the Federal Tort Claims Act, recognized a distinction between suits by civilians, as compared with suits by members of the armed forces, injured in line of duty. Civilians were given the right to sue the Government for damages based on tort, while military personnel injured in line of duty, were denied such a right.

Since petitioner herein was a civilian, and since it appears clear from the foregoing authorities, that there is nothing in the Public Vessels Act to prevent him from recovering damages based on tort, we now turn to a consideration of the Federal Employees' Compensation Act.

Prior to the *Johansen* and *Mandel* cases, supra, the Federal Employees' Compensation Act had been consistently interpreted as not providing an exclusive remedy to a civilian government employee injured during the course of his work. If he was able to show that his injuries were due to some faulty condition for which the government had waived immunity through some tort liability act, then the employee could elect compensation under 5 U. S. C. A. 757, or else seek damages under any applicable tort act.

In *Dahn* v. *Davis*, etc., 258 U. S. 421, 42 Sup. Ct. 320 (1922), a railway clerk employed by the Government was injured during a train wreck, while the Government was operating the railroad. There was a statute entitling persons to sue the Government for damages in the event of its negligent operation of the railroad. There was also in existence the Federal Employees' Compensation Act. The injured employee filed a suit to recover damages under the Railway Act, and the Government sought a dismissal on the ground that the Compensation Act was his only remedy. Far from holding that Compensation was the man's sole and exclusive remedy, Mr. Justice Clarke clearly stated at page 428:

> "This reference to the two acts shows that the petitioner had two remedies, each for the same wrong and both against the U. S. * * *"

The Court in the *Dahn* case then held that the shore-employee involved, had made an election under the facts of that case, to pursue his Compensation remedy, and therefore could not now sue for damages. (The case did not involve a civilian seaman, to whom, as we shall show, different principles apply in determining what constitutes an "election".)

In *U. S.* v. *Marine,* 155 F. 2d 456 (C. C. A. 4th, 1946) a customs inspector, employed by the Government, was injured during his work, while he was on a merchant vessel owned and operated by the United States. Instead of seeking Workmen's Compensation, he filed a suit against the Government under a tort liability act (Suits in Admiralty Act). The United States contended that compensation was his exclusive remedy, but the Court held that his right to elect to sue for damages in tort was "unchallengeable" (p. 458).

In *U. S.* v. *Loyola,* 161 F. 2d 126 (C. C. A. 9th, 1947) a civilian seaman, employed on an army transport became disabled. The Court held that although this was a public vessel, he had a right to seek damages from the Government in tort under the Public Vessels Act.

In *Brooks* v. *U. S.,* 337 U. S. 49, 69, Sup. Ct. 918 (1949), a soldier riding in a private car while on leave, was injured as the result of a collision with a negligently driven Army truck. There was a tort liability act applicable (Federal Tort Claims Act) and there was also a type of compensation act applicable to military personnel. Recovery of damages was permitted, although the plaintiff was a member of the armed forces, because the injuries did not arise out of an activity incidental to his military service. Not being on active duty, his rights were like those of a civilian. In reversing the Court below, and finding in favor of the injured man, Mr. Justice Murphy stated:

(p. 53)

"Provisions in other statutes for disability payments to servicemen * * * indicate no purpose to forbid tort actions under the Tort Claims Act * * * we will not

call either remedy in the present case exclusive, nor pronounce doctrine of election of remedies when Congress has not done so."

(p. 54)

"We conclude that the language, framework and legislative history of the Tort Claims Act require holding that petitioner's actions were well founded."

Gibbs v. *U. S.*, 94 F. Supp. 586 (D. C. Cal., 1950), while a lower Court decision, contains an excellent review of the numerous decisions affecting this problem. It comes to the positive and uncategorical conclusion that the Federal Employees' Compensation Act had never been interpreted as affording an exclusive remedy to federal civilian employees when there was also available a parallel remedy to seek damages against the Government under a tort liability act.

Thus, it was recognized at that time that there was "nothing in the Federal Employees' Compensation Act which directly or indirectly would bar the right" to seek damages against the Government in the absence of an "election", i.e., one could choose to sue for damages or elect to take compensation. *United States* v. *Marine*, 155 F. (2d) 456, 459 (C. C. A. 4th, 1946).

Since it was recognized by the highest judicial authorities that the Federal Compensation Act, read in conjunction with parallel tort legislation waiving sovereign immunity, meant that there was a right of election on behalf of civilians, the Government sought to amend the Federal Employees' Compensation Act in the fall of 1949, so as to eliminate the right of election, relegating civilians employed by the Government, to an exclusive remedy by way of compensation.

Thereafter, by an Act of October 14, 1949, Congress amended section 757 of the Federal Employees' Compensation Act, so that the Section presently reads as follows:

"§ 757. Persons receiving compensation not to be paid for other services; pensions; election; right to compensation as exclusive; exception

(a) As long as the employee is in receipt of compensation under sections 751-791, 793 of this title, or, if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services in the Army or Navy of the United States: Provided, that whenever any person is entitled to receive any benefits under sections 751-791 and 793 of this title by reason of his injury, or by reason of the death of an employee, as defined in section 790 of this title, and is also entitled to receive from the United States any payments or benefits (other than the proceeds of any insurance policy), by reason of such injury or death under any other Act of Congress, because of service by him (or in the case of death, by the deceased) as an employee, as so defined, such person shall *elect which benefits he shall receive.* Such election shall be made within one year after the injury or death, or such further time as the Administrator may for good cause allow, and when made shall be irrevocable unless otherwise provided by law.

(b) The liability of the United States or any of its instrumentalities under sections 751-756, 757-791, and 793 of this title or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute: *Provided, however, that this subsection shall not apply to a master or a member of the crew of any vessel.* As amended July 1, 1944, c. 373, Title VII, § 705 (a), 58 Stat. 312; 1946 Reorg. Plan No. 2, § 3, eff. July 16, 1946, 11 F. R. 7873, 60 Stat. 1095; Aug. 13, 1946, c. 958, § 5, 60 Stat. 1049; Oct. 14, 1949, c. 691, Title II, § 201, 63 Stat. 861." (Italics supplied.)

In addition, at 5 U. S. C. A. 791-4 Congress, in the same amendment of October 14, 1949, further provided as follows:

"§ 791-4 Applicability to seamen.

(a) Nothing contained in this Act shall be construed to affect the exclusion of certain seamen (as defined in section 1291 of Appendix to Title 50) from the terms of the Federal Employees' Compensation Act, as provided by section 1291 of Appendix to Title 50.

(b) *Nothing contained in this Act shall be construed to affect any maritime rights and remedies of a master or member of the crew of any vessel.* Oct. 14, 1949, c. 691, Title III, § 305, 63 Stat. 868." (Italics supplied.)

While it is probably of little importance, we note that in this case, the libellant sustained his injury before the enactment of the October 14, 1949 amendment. However, the Government acted upon his compensation application, and made its payment of compensation benefits to him, all subsequent to the amendment. The benefits covered a period which was partly before the effective date of the amendment, as well as a period which was subsequent to the effective date of the amendment.

It is significant that the amendment of October, 1949, preserved this right of election in favor of only seamen, but eliminated the right of election of other civilians, showing that Congress recognized that there are special considerations applicable to those following the calling of the sea.

This did not come about by accident. Senator Morse from Oregon introduced a specific amendment (adopted by Congress), which excepted seamen from its provisions, preserving their prior right to elect (See "Recent Trends in the Controversy Over the Extension of Workmen's Compensations", 4 N. A. C. C. A. Law Journal 229, pp. 233-4 (1949)). This amendment was accepted by Senator Douglas, when it was made clear to him that there had been no hearings on this aspect of the pending bill, and that it might otherwise be interpreted as denying the right of

election of Government-employed civilian seamen, as recognized by the Courts. See statement of Senator Douglas at 95th Congressional Record 13609, 138758, as follows:

> "It is my further understanding that this bill as amended will only change the status quo of seamen to the extent that it increases compensation rights of those government-employed seamen covered by the act. For the same reason, namely, that we have had no hearings on the matter, we are not seeking to legislate affirmatively as to certain claims and denials of a right of election of remedies under existing laws, which claims and denials have not yet been adjudicated by the Supreme Court, although various other Federal Courts have, in effect, held that federally employed seamen have such an election".

It is therefore quite clear that the Department of Justice and the Bureau of Employees' Compensation attempted to so amend 5 U. S. C. 757, as to relegate civilian seamen, employed on public vessels, to an exclusive remedy by way of Workmen's Compensation, eliminating their right to sue for damages under the Public Vessels Act. This, however, did not meet with Congressional approval. In short, the Government was unsuccessful in its attempt to have Congress over-rule the decisions of the Courts in the Fourth and Ninth Circuits, as set forth in *U. S.* v. *Marine*, 155 F. (2) 456 (C. A. 4th, 1946), and *U. S.* v. *Loyola*, 161 F. (2d) 126 (C. A. 9th, 1947), which was subsequently followed by the recent decision in *Johnson* v. *U. S.*, 186 F. (2d) 120 (C. A. 4th, 1951), which squarely held that both before and after the 1949 amendment, a civilian seaman, injured on a public vessel, could seek either Workmen's Compensation, or sue in tort, stating as follows:

> "(1) In 1949 Congress passed an amendment to the Federal Employees' Compensation Act for the obvious purpose of confining the liability of the United States for injury or death of an employee to the compensation provided by the statute. See Sections 201 (h), 303 (g) and 305 (b) of the Act, approved October 14, 1949, Ch. 691, U. S. Cong. Serv., 81 Cong., 1st Sess.,

866 et seq., 5 U. S. C. A. §§ 757, 791-4. This enactment put an end to the option found to exist in the decision of this Court in *U. S.* v. *Marine*, supra. But Section 201 (b) was expressly limited during the progress of the bill through the Senate by a provision that it should not apply to a master or a member of the crew of any vessel; and in the debate on the floor the purpose of the limitation was stated to be to preserve the rights of seamen and to leave them in exactly the position in which they then were. 95 Cong. Rec. 13874-5. The Clarification Act had already provided that seamen employed by the War Shipping Administration should not be considered as employees of the United States for the purpose of the Compensation Act; but the Amendment of 1939 was not limited to such seamen but applied to the members of the crew of any vessel. See *Militano* v. *U. S.*, 2 Cir., 156 F. (2d) 599. This enactment is relevant to the present discussion, if at all, in that it indicates the same purpose disclosed in the earlier statutes to enlarge rather than restrict the rights of seamen to recover for personal injuries from the United States. The legislative history of the Public Vessels Act, which is set out in *Canadian Aviators, Ltd.* v. *U. S.*, 324 U. S. 215, 218, 65 S. Ct. 639, 89 L. Ed. 901, and in *American Stevedores* v. *Porello*, 330 U. S. 446, 450, 67 S. Ct. 847, 91 L. Ed. 1011, discloses the same general purpose. In our opinion the government's position is not supported by the circumstances under which the foregoing statutes were enacted."

In the light of the foregoing historical background, it would certainly seem that the Courts of Appeal for the Second and Third Circuits, have now, by their decisions, adopted the very judicial amendment which Congress expressly deleted in 1949.

POINT II

The mere acceptance of compensation by a seaman, is not the equivalent of an election.

As to Government-employed civilian shoreside personnel, it has been held that the Federal Employees' Compensation Act was adopted "to give compensation to its employees, who otherwise would be without remedy", and as to such persons it had been held that receipt and acceptance of compensation benefits is an election, which would be a bar against suing the Government thereafter for damages.

Dahn v. *Davis,* 258 U. S. 421, 41 Sup. Ct. 320 (1922);
Brady v. *Roosevelt S. S. Co.,* 317 U. S. 575, 587, 63 Sup. Ct. 425 (1943);
Militano v. *United States,* 156 F. (2d) 599 (C. A. 2d 1946);
American Stevedores, Inc. v. *Porello, et al,* 330 U. S. 446, 67 Sup. Ct. 847 (1947).

None of those cases involved seamen. However, in cases involving seamen injured while employed on a public vessel, the Courts have held that the mere application for compensation benefits, coupled with acceptance of payment of such benefits, did not constitute, in and of itself, an "election".

Johnson v. *United States,* 186 F. (2d) 120 (C. A. 4th, 1950);
Mandel & Schmidt v. *United States,* 74 F. Supp. 754 (E. D. Pa., 1947) rev. on appeal on other grounds, 191 F. 2d 164;
Johansen v. *United States,* 191 F. (2d) 162, 163 (C. A. 2nd, 1951). (Instant case, dissenting opinion. Majority did not pass on this point.);
Gibbs v. *United States,* 94 F. Supp. 586 (D. C. Calif., 1951);

McKenney v. *United States*, 99 F. Supp. 121 (D. C. Calif., 1951);
Rodriguez v. *United States*, F. Supp. , 1951 A. M. C. 512 (D. C. Penna.).

That seamen's cases should be placed in a separate category, is entirely consistent with the liberal tradition in which the courts have interpreted their rights. Historically, the courts, as well as the Legislature, have adopted special provisions for their benefit and protection, and it has been held that even where a seaman files a suit against his Government, or against a Governmental agency, the Court will not permit a general statute intended for shore workers, to be applied so as to delimit the rights of seamen, where there exist specific laws and rulings applicable to mariners showing an intent to safeguard and enlarge their rights.

Shilman v. *United States, et al.*, 164 F. (2d) 649, 652 (C. C. A. 2d, 1947), cert. den. 333 U. S. 837, 68 Sup. Ct. 608 (1948).
Wagner v. *Panama Railroad Co.*, 299 N. Y. 432 (1949).

In *McCarthy* v. *Amer. Eastern Corp.*, 175 F. (2d) 724 (C. A. 3rd, 1949), the Court held that the word "election", as applied to seamen, is not to be given such a harsh construction, as would put them in a position wherein, at their peril, they would be compelled to give up a substantial right, when the word could be given an interpretation more in keeping with the solicitude which the courts have shown for seamen as wards of the Court throughout the years. That case was cited with approval in *Balado* v. *Lykes Bros. SS Co., Inc.*, 179 F. (2d) 943 (C. A. 2d, 1950).

For the same reasons relied on by the Court in the *McCarthy* case, a seaman cannot release his right to sue for damages for personal injuries, unless it is shown that he signed the release with (a) a full understanding of his legal rights; (b) with knowledge of his physical condition; and (c) for a fair and adequate consideration; and the burden

is upon the seaman's employer to prove these things affirmatively, by positive evidence, in order for the seaman to be deprived of rights given him by Maritime Law.

Garrett v. *Moore McCormack Lines Inc.*, 317 U. S. 239, 63 Sup. Ct. 246 (1942);
Bay State Dredging & Contracting Co. v. *Porter*, 153 F. (2d) 827 (C. A. 1st, 1946);
Hume v. *Moore McCormack Lines, Inc.*, 121 F. (2d) 336 (C. C. A. 2d, 1941).

That same rule has been applied even where the Government is the employer of the seaman.

Muruaga v. *United States*, 172 F. (2d) 318 (C. A. 2d, 1949).

We respectfully submit that, with the foregoing as established law, the mere payment of workmen's compensation to a seaman, and his acceptance of such benefits, would not constitute an "election", where his legal rights were not made known to him, and where the other requirements set forth in the above cases, have not been complied with.

Even in a longshoreman's case, an injured workman cannot "elect" unless he knows that he has an alternative remedy. In *Johnsen* v. *American Hawaiian S.S. Co.*, 98 F. (2d) 847 (C. C. A. 9th, 1938), the Court stated:

> "The question thus before this court is whether ignorance on the part of the plaintiff of his right under the act to elect will prevent a valid binding election. In other words, may an employee who has 'elected' to accept compensation under the act without knowledge of the provisions thereof, 'rescind' such election upon discovering his rights thereunder.
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> * * * * * * *
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> It seems well settled by the weight of authority in cases other than those dealing with workmen's compensation acts, that an election is not valid and binding where the action has been taken by one without knowledge of his rights and where rights of innocent third parties have not been affected adversely."

It is now well established that the liberal provisions of the Jones Act (46 U. S. C. A. 688) and the General Maritime Law, are read in conjunction with the Public Vessels Act and the Suits in Admiralty Act. These apply to the remedies which seamen and longshoremen have, permitting them to sue for damages sustained on a public vessel of the United States, for maintenance and cure, and even for wages.

American Stevedores, Inc. v. *Porello,* 330 U. S. 446, 67 Sup. Ct. 847 (1947);
Canadian Aviator Ltd. v. *United States,* 324 U. S. 215, 65 Sup. Ct. 639 (1945);
Mejia v. *United States,* 152 F. (2d) 686 (C. C. A. 5th, 1945) cert. den. 328 U. S. 862, 66 Sup. Ct. 1366;
United States v. *Loyola,* 161 F. (2d) 126 (C. C. A. 9th, 1947);
Johnson v. *United States,* 186 F. (2d) 120 (C. A. 4th, 1950);
Lauro v. *United States,* 162 F. (2d) 32 (C. C. A. 2d, 1947);
Thomason v. *United States,* 184 F. (2d) 105 (C. A. 9th, 1950);
Jentry v. *United States,* 73 F. Supp. 899 (D. C. Cal., 1947);
Lawson v. *United States,* 1950 A. M. C. 617 (D. C. Cal.).

Longshoremen, from time to time, have been held to be seamen within the meaning of the maritime laws, in order that they might be given the greater historical protection which is accorded to seamen in personal injury cases. *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, 66 Sup. Ct. 872 (1946). However, where a longshoreman has received workmen's compensation under the Longshoremen's Compensation Act, he is not barred thereafter from suing the United States of America for damages, pursuant to the Public Vessels Act.

American Stevedores, Inc. v. *Porello,* 330 U. S. 446, 67 Sup. Ct. 847 (1947).

If then, a longshoreman, who has received compensation under the Longshoremen's Compensation Act, following an injury received on a public vessel, is not barred from suing the Government thereafter for damages under the Public Vessels Act, then why should an injured seamen be barred, when he supposedly has greater rights? And further, if an injured seaman cannot even give up his right to claim damages by the signing of a release, unless he has been made aware of all of his rights, then how can he waive his right to seek damages where he has not even signed a release, as in this case? See *Muruaga* v. *United States*, 172 F. (2d) 318 (C. A. 2d, 1949).

It therefore would seem to be established and sound law that the mere payment and acceptance by a seaman of workmen's compensation benefits, when he is entitled to sue for damages, would not, in the absence of an express statute to the contrary (which certainly is not the case here), bar him from suing thereafter to recover damages, when he was not made aware of his rights, but, on the contrary, was even misled as to his rights. Of course, the amount received under the Compensation Act in such a case, would properly be deducted from the verdict awarded to the seaman for damages.

Gahagan Construction Corp. v. *Armao*, 165 F. (2d) 301 (C. C. A. 1st, 1948) cert. den. 333 U. S. 876, 68 Sup. Ct. 905 (1948);

Kibadeaux v. *Standard Dredging Co.*, 81 F. (2d) 670 (C. C. A. 5th, 1936).

CONCLUSION

The Circuit Court came to the conclusion that Congress never intended that civilian seamen working on public vessels should be given greater rights to sue for damages than members of the armed forces. But this would seem to be a matter for Congress to decide.

Rather would it seem that civilian seamen, who perform the same duties on a public vessel, as they would on a merchant vessel owned by the Government, ought not to be deprived of rights which are enjoyed by their brethren working on the latter class of vessels, merchant seamen being unquestionably entitled to sue for damages.

After all, civilian seamen employed on public vessels are not military personnel. They do not enjoy the privileges enacted by Congress for the protection of members of the armed forces, and, while sometimes subject to military law, they remain civilians. (*Osbourne* v. *U. S.* 164 F. (2d) 767, 769 (C. A. 2nd, 1947.)

It is a further fact that all civilian seamen, whether employed on a public vessel or a merchant vessel, do give up certain basic rights, such as the right to strike, by voluntarily consenting to subject themselves to the rigors and discipline of life at sea. This, and other aspects of their employment, has prompted Congress to adopt special legislation for their benefit. In commenting on this aspect of a mariner's vocation, Mr. Justice Byrnes, stated in *Southern SS. Co.* v. *N. L. R. B.*, 316 U. S. 31, 62 Sup. Ct. 886 (1942) at page 39:

> "On the other hand workers at sea have been the beneficiaries of extraordinary legislative solicitude, undoubtedly prompted by limits upon their ability to help themselves."

This is again seen in the Compensation Act amendment of October, 1949, the importance of which lies in the fact that it shows that Congress also recognized that under existing law, seamen have special rights, and are governed by special rules, in view of their status as wards of the Court. It was also a recognition by Congress that, under existing law, compensation is not the exclusive remedy of seamen employed by the Government on a public vessel.

The decisions of the Fourth and Ninth Circuits therefore appear to be in accord with the historical background of this legislation, and to correctly interpret the pertinent

principles of law applicable to this case, while the recent decisions of the Second and Third Circuits, seem to be a complete departure from what had previously been recognized as well established law.

A writ of certiorari should issue to the Circuit Court of Appeals for the Second Circuit to resolve the conflict between the Circuits on this important Federal question.

Respectfully submitted,

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